



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

April 9, 2009

Nancy Walsh
1819 McClarney Court
Indianapolis, Indiana 46217

*Re: Informal inquiry 09-INF-8 regarding alleged violation of the Open Door Law
by the Metropolitan School District of Perry Township*

Dear Ms. Walsh:

I am in receipt of your informal inquiry dated February 12, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write to inquire about an executive session meeting of the Metropolitan School District of Perry Township Board of Education ("Board") held on July 24, 2008. You were a member of the Board at that time, but you write in your individual capacity. You inquire whether the Board violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) at that meeting.

BACKGROUND

You submitted a formal complaint to this office on February 12, 2009. Because the complaint alleged a violation of the ODL at the July 24, 2008 Board meeting, the complaint was untimely pursuant to I.C. § 5-14-5-7. As such, the complaint was converted into an informal inquiry.

You allege that at the July 24 Board meeting, which was conducted for the purpose of strategy discussions authorized by I.C. § 5-14-1.5-6.1(b)(2), the Board President explained and circulated a letter seeking Board member signatures in support of a position related to allegations of ghost employment contained in a draft audit report of the Indiana State Board of Accounts ("SBOA"). You allege that four of the seven members of the Board signed the letter. You make the following allegations:

1. The action constitutes official action of a governing body and the official action was not addressed in the notice or minutes of the meeting,
2. The discussion was not permissible subject matter for an executive session, and

3. Signing the document constituted taking final action in executive session, in violation of the ODL.

In support of these allegations, you contend that a majority of the Board discussed the letter in an executive session rather than bringing the issue for a vote at a public meeting. Further, you allege the letter was not referenced in the minutes of any meeting and was labeled confidential by the SBOA as part of the preliminary draft of the SBOA audit report. The report was finalized and made available to the public on February 11, 2009. You further contend that the Board President holds out the contents of the letter as the position of the Board.

The Board responded to the inquiry by letter dated March 13, 2009 from attorney David Day, whose firm now represents the Board but did not represent the Board at the time of the July 24 meeting. The Board explains that as of July 24, the SBOA had been conducting an audit for several months concerning paid leave granted to three employees of the District. The SBOA issued a draft report in June 2008 wherein it indicated the paid leaves were not granted in compliance with Indiana law and suggested the paid leaves might be considered ghost employment, which is a criminal act. The draft report further indicated that the employees should be required to pay back the salaries paid during leave.

The Board contends it met in executive session to discuss the draft report. The Board contends it cited I.C. § 5-14-1.5-6.1(b)(2) because that provision allows a discussion of strategy with respect to initiation of litigation. The Board argues that it needed to discuss whether to initiate litigation against any of the employees in order to retrieve the salary paid during the leaves. During the discussion, the Board President explained his position and indicated he was planning to send a memorandum to the SBOA, explaining why he thought the draft audit report was incorrect. He circulated the draft, and three other members signed it. The Board contends that other Board members, including you, acted in their individual capacities to submit comments to the SBOA.

The Board contends that the signing of the memorandum does not constitute final action. The Board argues that the fact that several Board members share the same opinion does not transform the opinion to final action. The Board further contends that while you allege the Board President held out the memorandum as the Board's position, the Board President in his letter to the SBOA indicated that SBOA's timeline did "not permit Perry Township's full Board to respond . . ."

While the Board contends the discussion was appropriate based on I.C. § 5-14-1.5-6.1(b)(2), the Board also acknowledges it might have been appropriate to hold the executive session based on I.C. § 5-14-1.5-6.1(b)(7). This provision allows an executive session for a discussion of records classified as confidential under state statute. Because the audit report was in draft form and had not been signed, verified and filed by the SBOA, it was confidential pursuant to I.C. § 5-11-5-1.

My office also received a letter in support of your allegations from another Board member, Barbara Thompson. Ms. Thompson alleges the March 13 letter from Mr. Day contains “many inaccurate statements,” but she does not identify which statements she contends are inaccurate. A copy of Ms. Thompson’s correspondence is enclosed for your reference.

ANALYSIS

The ODL requires that a meeting of a governing body of a public agency must be open so members of the public may observe and record. Ind. Code § 5-14-1.5-3(a). A “meeting” is a “gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. § 5-14-1.5-2(c). Executive sessions may be held only for the instances listed in I.C. § 5-14-1.5-6.1(b).

You present three allegations in your informal inquiry:

1. The action constitutes official action of a governing body and the official action was not addressed in the notice or minutes of the meeting,
2. The discussion was not permissible subject matter for an executive session, and
3. Signing the document constituted taking final action in executive session, in violation of the ODL.

First, you allege that the discussion and signing of the document in the July 24 executive session constitutes official action which was not addressed in the notice or minutes of the meeting. Official action is receiving information, deliberating, making recommendations, establishing policy, making decisions, or taking final action. I.C. § 5-14-1.5-2(d). I agree that discussing the SBOA draft audit report is official action, since the Board received information, deliberated, and made decisions regarding public business.

As I understand it, you contend that because the Board took official action, that official action should have been addressed in the notice and minutes of the meeting. The notice for the July 24 meeting included the date, time and location of the meeting. Further, it included the statement of the specific instances authorizing the executive session, namely a discussion of strategy with respect to initiation of litigation. Pursuant to I.C. § 5-14-1.5-5 and I.C. § 5-14-1.5-6.1(d), the notice conforms to the notice requirements of the ODL. Nothing in the ODL requires the Board to utilize an agenda or to identify in the notice which specific topics the Board will cover as it discusses strategy with respect to initiation of litigation.

In addition, the ODL does not require an agency to create minutes of meetings. Instead, the ODL requires an agency to take memoranda of each meeting. The required memoranda are listed in I.C. § 5-14-1.5-4(b). Additional information required to be included in memoranda of executive sessions is found in I.C. § 5-14-1.5-6.1(d). I have

reviewed the memoranda created after the July 24 meeting, and it is my opinion the Board has complied with the ODL in this regard. As with the notice, nothing in the ODL requires the Board to list each topic discussed in the executive session. Instead, the ODL requires that the memoranda cite the specific instance in I.C. § 5-14-1.5-6.1(b) allowing the agency to hold an executive session and to include the general substance of matters proposed, discussed or decided. The Board complied with this requirement.

Second, you contend the subject matter discussed at the July 24 meeting was not appropriate subject matter for an executive session. In my opinion the subject matter was appropriate for executive session. The notice of executive session for the July 24 meeting cited I.C. § 5-14-1.5-6.1(b)(2)(A) and (B) as the reasons for the executive session. The Board contends the discussion was appropriate under I.C. § 5-14-1.5-6.1(b)(2)(A) because the Board needed to discuss whether to initiate litigation to attempt to compel the affected employees to pay back the salaries they were paid while on leave. As Mr. Day contends, a discussion of strategy with respect to the initiation of litigation will inevitably include a discussion of options other than litigation. In my opinion, the citation to I.C. § 5-14-1.5-6.1(b)(2)(A) was appropriate. I do not have enough information to determine whether the citation to I.C. § 5-14-1.5-6.1(b)(2)(B) was appropriate.

As Mr. Day suggests, it likely would have been more appropriate to hold the executive session based on I.C. § 5-14-1.5-6.1(b)(7). Draft audit reports are confidential until the final report is verified, signed, and filed by the state examiner. See I.C. § 5-11-5-1. Because the audit report was a draft and was not yet filed by the time of the July 24 meeting, it was a record declared confidential by state statute. As such, the Board could conduct an executive session to discuss the report as well as what the Board's response to the report would be, if any. While it is my opinion that I.C. § 5-14-1.5-6.1(b)(7) is the most appropriate instance for the July 24 meeting, I do not think the Board violated the ODL by holding the meeting based on I.C. § 5-14-1.5-6.1(b)(2)(A).

Finally, you contend that four of the seven members of the Board took final action by signing the document in executive session. Final action is "a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order." I.C. § 5-14-1.5-2(g). It is my understanding Board members did not vote at the July 24 meeting. Instead, the Board discussed the draft audit report and the Board President's memorandum, and four of the seven members signed the memorandum.

I find no case law which would support your position that four members signing a document constitutes final action by a governing body. In contrast, though, the Indiana Court of Appeals has held that a governing body may make decisions in executive session. If the Board made the decision during executive session to initiate litigation or to send the discussed memorandum to the SBOA, that action would have been permissible pursuant to *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), so long as a vote was not taken at the executive session.

In *Baker*, Town Marshal Baker alleged that during an executive session to discuss his job performance, the Town Council violated the ODL by compiling a list of persons to be rehired and keeping his name off the list. The list was later used in a public meeting to make decisions on who would be rehired. The court held that the compilation of the list was not "final action" and that creating the list did not go beyond the scope of the General Assembly's expressed intent to permit governing bodies the ability to meet privately to discuss certain personnel matters. Instead, the court said the "final action" consisted of the Council's vote at the public meeting. *Id.* at 71. Similarly, any decisions made by the Board during executive session in the present matter would not constitute final action.

CONCLUSION

For the foregoing reasons, it is my opinion the Metropolitan School District of Perry Township Board of Education did not violate the ODL at the July 24, 2008 executive session.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: David Day, Church, Church, Hittle & Antrim
Stephen Maple, Metropolitan School District of Perry Township Board of
Education